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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ANTONIO DEINDE FERNANDEZ,

Petitioner,

—v.—

BARBARA J. FERNANDEZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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The petitioner respectfully submits this brief in reply to the Brief for the United States as *Amicus Curiae.*

1. The Concerns Expressed By The United States Further Support The Granting Of The Petition

The United States in its brief has informed this Court that if the decision of the Connecticut Supreme Court relied on the Limited Waiver as a basis for assuming jurisdiction beyond the scope of that waiver, "the decision would be incorrect and could cause substantial difficulties in the conduct of international relations," would set "a dangerous and erroneous precedent that might be construed as approving the disregard of the terms of waivers of immunity" and would have all of the dire consequences delineated in the government's brief. (*Amicus* at

10, 11, 12). Because the only plausible reading of the decision of the Connecticut Supreme Court is that it did so utilize the Limited Waiver, the grave concerns expressed by the United States provide further support for the granting of the petition.

In a tortured attempt to obfuscate the clear involvement of the Limited Waiver in the decision below, the United States suggests two arguments—neither of which was even hinted at by the Connecticut Supreme Court. First, the government suggests that the Limited Waiver simply made available an exception otherwise set forth in the Convention. (*Id.* at 13) Secondly, the government argues that it is "not troubled" by the Limited Waiver because the Connecticut Supreme Court could have reached the same result by another means. (*Id.*) Wholly apart from the sophistry in these two arguments as demonstrated below, this very approach is wrong. To speculate that a court could have reached the same result in another fashion does not correct what the court in fact actually did decide nor erase the damaging precedential value of the case.

The majority in the decision below clearly relied on the Limited Waiver for the creation of its jurisdiction in this case. That the majority also relied upon the Limited Waiver for the creation of its jurisdiction over Ambassador Fernandez's property—as opposed to some other independent source for jurisdiction—is obvious. For, as the majority noted, "we need not decide whether the trial court's *in rem* jurisdiction, which is *ancillary* to its jurisdiction over the status of the marriage, would continue if the sending state's waiver were to be withdrawn." (Pet. App. at 12a n.9 (emphasis added)). Clearly, if the court's jurisdiction over the property was *ancillary* to its jurisdiction over the marital *res*—a jurisdiction it acquired only by virtue of the Limited Waiver—its jurisdiction over the property, being ancillary thereto, could only derive from the Limited Waiver. In fact, in response to the dissent's suggestion that the majority rely on the "real action" exception instead of the Limited Waiver with respect to its assertion of jurisdiction over the Ambassador's property (*id.* at 20a), the majority responded: "The dissent suggests a ground for jurisdiction that was not argued by either party in this court. In our view, we

lack either a factual or legal basis for exploring it in this case." (*Id.* at 14a n.11). Because the Limited Waiver was the basis for the majority's assertion of jurisdiction over the Ambassador's property and was thereby plainly violated, the decision will have all of the devastating international repercussions that the United States itself has stated will inevitably ensue.

But even if it is assumed that the government's approach of postulating unarticulated rationales for facially troubling decisions is proper, both of the government's alternative rationales are wrong. In this regard the United States first asserts that, even if the Connecticut Supreme Court relied on the Limited Waiver, "the decision goes no further than to indicate that *a waiver may make applicable an exception to immunity from jurisdiction in the Vienna Convention itself* . . . [*i.e.*] the real action exception . . ."[1] (*amicus* at 13 (emphasis added)). Consequently, the United States declares that "*the decision could not*, under any reading, *support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention.*" (*Id.* (emphasis added)). The confusion in this assertion becomes apparent in light of the United States' own statements regarding Article 31 and the claims of Mrs. Fernandez in this case. In this regard, the United States acknowledges that:

> 1. "[T]he drafters of the Convention clearly intended that divorce actions would be within the general grant of immunity for 'civil' actions . . ." (*id.* at 18 n.26).
>
> 2. The "real action" exception should apply, at its core, to actions "brought to settle title . . . in real property, against the whole world or particular persons, based on *pre-existing* claims of property rights." (*Id.* at 17 (emphasis added)).
>
> 3. Mrs. Fernandez's divorce claim to the property does not involve such a "traditional, pre-litigation property

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1 Ironically, the Ambassador has never maintained that Mrs. Fernandez would need a waiver to implement this exception to immunity—the Convention itself provides for it.

right," but rather an attempt to *acquire* property "by reference to general equitable principles *unrelated to the property itself.*" (*Id.* at 18 (emphasis added)).

Mrs. Fernandez has never claimed she presently has any legal or beneficial interest to the *entirety* of the property. Indeed, to the contrary, she has clearly stated that, at best, she has only a partial interest. Consistent with that position, she recognized in her complaint in this matter that Ambassador Fernandez has a "legal and beneficial" interest in the property. What she is seeking in this action, however, is not an adjudication of her claimed partial, "pre-litigation" interest in the property pursuant to section 31(1) of the Vienna Convention, but rather, as recognized by the dissent below, an "*assignment* to [her] of *all of [the Ambassador's]* right, title and interest in [the property] *pursuant to [General Statutes] § 46b-81.*" (Pet. App. at 17a (emphasis added)). She is not seeking an *in rem* adjudication or vindication of *her* partial title—she is seeking a *divorce based aggrandizement* of her alleged interest in the property by a transfer of the Ambassador's interest in the property to her. And this aggrandizement, for which there is no basis whatsoever in the "real action" exception, is precisely what the Connecticut Supreme Court allowed stating: "On remand, then, it is for the trial court to determine whether to grant the plaintiff title to the disputed real property."[2] (*Id.* at 14a). The only way the court could have reached this result was by allowing a divorce based claim for an assignment of property to proceed—a claim with respect to which the Ambassador retained his immunity—under the guise of an independent real action proceeding.

While Mrs. Fernandez may have the right to bring a separate proceeding under Article 31(1), that Article does not provide,

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2 If the effect of the Connecticut Supreme Court's decision was simply to permit the adjudication of an Article 31(1) real action claim, as suggested by the United States, all that Mrs. Fernandez would be entitled to at the conclusion of the proceeding would be a determination of whatever interest she already may have in the property. This correct understanding was articulated by the dissent below. (Pet. App. at 20a-21a).

by any stretched reading, an independent basis for an enhancement of a party's interest in property based on a *dissolution of a marriage.*[3] Contrary, then, to the government's conclusion that the decision "could not support a state's use of a limited waiver to find broader jurisdiction not covered by an express provision of the Vienna Convention," the decision of the Connecticut Supreme Court does precisely that!

The second major error of the United States in denying the significance of the Limited Waiver in the decision of the Connecticut Supreme Court is its claim that the waiver was significant "only because [it] supplied the necessary substantive predicate (dissolution) for Mrs. Fernandez to raise her claim to property upon dissolution." (*Amicus* at 13). The government then postulates that, because the "substantive predicate" of dissolution could have been obtained in some other unexplained fashion, Mrs. Fernandez still could have litigated her divorce claim to the property in Connecticut under the "divisible divorce" doctrine. (*Id.* n.18)

In making its divisible divorce argument, the government suggests that "*perhaps*" Mrs. Fernandez could obtain an *ex parte* divorce in some other jurisdiction and, then, adjudicate her divorce-based property claims against the Ambassador in Connecticut. The government, as it must, then attempts to distinguish *Taylor v. Taylor*, 168 Conn. 619, 362 A.2d 795 (1975)—a decision which plainly disallowed such a secondary divorce-based property litigation—by claiming that the case was decided under a prior statute. It fails in this endeavor, however, because both the earlier and the present statutes specifically provide that any award of property must be made by the court that entered the decree dissolving the marriage. Moreover, in its earlier brief to the Connecticut Supreme Court,

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3 Indeed, as recognized by the dissent below, not only does the real action exception not provide such an independent basis for enhancing a present interest, Mrs. Fernandez is "*barred* by the Convention . . . from enhancing whatever interest in the residence she may presently possess . . . ." (Pet. App. at 19a (emphasis added)).

and inconsistent with its position before this Court, the United States recognized that, "in the absence of a waiver of diplomatic immunity, the Vienna Convention bars divorce actions." (*Amicus* at 3 n.4). Clearly this is true in all United States jurisdictions absent a decision voiding, on constitutional grounds, the Vienna Convention's extension of diplomatic immunity to divorce cases. This the Connecticut Supreme Court refused to do, specifically stating that because of the Limited Waiver, it did not have to extend the analysis of *Boddie v. Connecticut*, 401 U.S. 371 (1971), and address the otherwise necessary issue of voiding the Vienna Convention's extension of diplomatic immunity to divorce actions on constitutional grounds.[4]

The Limited Waiver was *the* vehicle upon which jurisdiction was based. It clearly prohibited its use as a jurisdictional basis for a divorce award of property. The Connecticut Supreme Court, however, after relying upon the Limited Waiver for jurisdiction, has authorized the trial court on remand to absolutely disregard the clear prohibition of the Limited Waiver.

In spite of the extraordinary and inexplicable efforts of the United States to sanitize the decision of the Connecticut Supreme Court,[5] the decision is the only reported decision of which petitioner is aware in which the intent of a limited waiver has been patently disregarded. Any suggestion that this case will

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4 Moreover, it is far from clear that an *ex parte* divorce obtained outside the United States would even be recognized. Even if such an *ex parte* divorce could be obtained and even if it were to be recognized under principles of international comity, a divorce based award of property would still necessitate the same personally intrusive proceedings described above. Conn. Gen. Stat. § 46b-81.

5 The government's brief in its description of the decision of the Connecticut Supreme Court is marked by a proverbial flood of speculative qualifiers such as: "we do not believe that the opinion *needs to be read* . . ." (*amicus* at 10 (emphasis added)); "the Connecticut Supreme Court's reference to the waiver of immunity *need not, in our view*, be understood . . ." (*id.* at 13 (emphasis added)); "Under this interpretation, *which we think is a plausible one* . . ." (*id.* at 14 (emphasis added)); "We believe the Connecticut Supreme Court *may have been thinking* . . ." (*id.* at 14 n.19 (emphasis added)); "the state supreme court *might well hold* . . ." (*id.* at 19 (emphasis added)).

not interfere with the granting of limited waivers in the future is ludicrous.[6]

2. The United States Misrepresents The Inescapable Intrusiveness Of The Proceedings That Would Occur On Remand

The United States is aware that divorce actions are precluded by the general rule of diplomatic immunity set forth in Article 31 because of the very intrusiveness of such proceedings. Nevertheless, the United States would apparently have this Court believe that a divorce award of the Ambassador's interest in the

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6 The assertion to that effect in this case is particularly galling in light of the fact that the issuance and effect of a Limited Waiver was discussed between representatives of the United States Department of State and counsel for Ambassador Fernandez before the Limited Waiver was issued. The Limited Waiver was intended to permit the State Department to participate in this proceeding without the embarrassment of having to support a total dismissal of a divorce action against a United States citizen and was submitted to the Department of State for that sole purpose.

In its brief, the United States has underscored the importance of limited waivers in international relations and stressed that, because of their significance, implications of waivers must be avoided—"[A] receiving state [must] strictly adhere to the terms of any waiver of immunity." (*Amicus* at 11-12). Against this backdrop, the United States then dissects the Limited Waiver in this case, noting that:

> The court did not find jurisdiction that violated an *express condition* of the waiver: although the waiver reflects an *assumption* that the Connecticut courts would only dissolve the marriage, the waiver *merely defined* what immunity was being waived. Accordingly, *the waiver does not by its terms preclude* the exercise of any such *additional* jurisdiction that has another lawful basis; nor is the waiver *by its terms* rendered inoperative by the assumption of such jurisdiction.

(*Id.* at 11 n.13 (emphasis added)).

Such a casuistical approach to the Limited Waiver in this case—a waiver that was induced by the United States—surely can not be regarded as reassuring to nations that may consider the use of limited waivers in the future and is hardly fair to the country that issued it here. Are foreign governments with different procedural and juridical regimes to be required to precisely predict all of the vicissitudes of the local law of the receiving state or are the waivers they send entitled to be read with plain common sense and interpreted as clearly intended?

property pursuant to section 46b-81 of the Connecticut General Statutes in a proceeding under the "real action" exception to the general rule of immunity set forth in Article 31 "*might*" not be too invasive. In this regard, the United States writes that section 46b-81 "*allows* the trial court, in determining what property to assign . . . to consider 'the length of the marriage, the causes for the . . . dissolution . . . , the age, health, station, occupation . . . of the parties . . . .' " (*Id.* at 9 n.10 (emphasis added)). And continues that a proceeding under that section "*may* also raise *nettlesome practical questions*, such as whether, . . . the court must inquire into the *overall* holdings of the parties." (*Id.* at 19 n.30 (emphasis added)). Then, in conclusion, the United States suggests that "the Connecticut Supreme Court *has not foreclosed the possibility* that judicial inquiry in applying Conn. Gen. Stat. § 46b-81 (1986) should, in light of the Vienna Convention, be more limited than usual." (*Id.* at 20).

To shirk its responsibilities to the Ambassador of a foreign sovereign nation and the foreign nation itself with such misleading suggestions is shocking.[7] Section 46b-81 is clear and the government knows it. It does not merely "allow" a "nettlesome" consideration of the statutory criteria—it mandates that the trial court "SHALL" consider all of the personally invasive factors prescribed by that statute in making an award of property. *Leo v. Leo*, 197 Conn. 1, 5, 495 A.2d 704, 707 (1985). Nor is there any suggestion anywhere in the opinion of the Connecticut Supreme Court of even the remotest possibility of a "more limited" inquiry on remand or of the authority of the court to do so in light of the statutory mandate.

In the same misleading fashion, the government, while conceding that the decision below is final for purposes of appeal "because the defense is one of *immunity*," then digresses and speculates in an inconsistent and irrelevant fashion that "it is *not entirely clear* whether the trial court, on remand, would

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7 *Cf.* Article 29 of the Vienna Convention (providing that a receiving state "shall treat [the diplomatic agent] with due respect and *shall take all appropriate steps to prevent any attack on his person, freedom or dignity.*" (Emphasis added)).

actually reach the equitable-distribution inquiry that raises the most troubling questions under the Vienna Convention." (*Amicus* at 10).

What is singularly at issue in this case is not whether or not the Ambassador might prevail with respect to his property, but whether or not diplomatic immunity precludes *his being subjected to a suit in the first place.* This matter hinges on a *claim of diplomatic immunity.*[8] If this matter is reviewed now and the Ambassador's interpretation of Article 31 is found to be correct, there will be no further proceedings in this matter.[9] If the matter is not reviewed now, Ambassador Fernandez would be faced with the same draconian choice that confronted the appellants in *Shaffer v. Heitner*, 433 U.S. 186, 196 n.12 (1977). He would "have the choice of suffering a default judgment or entering a general appearance and defending on the merits." It was with respect to cases like this that this Court has found finality in the past observing that such an entitlement to immunity from suit "*is effectively lost if a case is erroneously permitted to go to trial* . . . . in each case, the district court's decision is effectively unreviewable on appeal from a final judgment." *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (emphasis added).

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8 In footnote 12 of its brief, the United States suggests that based on "government records," the Ambassador would not have been entitled to immunity in this case until recently. Presumably the records in question are those of the Immigration and Naturalization Service, which are not part of the record in this case. Nevertheless, petitioner's diplomatic status is recognized by the United States Department of State, the People's Republic of Mozambique and the courts of Connecticut and is not in issue in this appeal.

9 *See Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 482-83 (1975).

CONCLUSION

For all the above reasons, as well as those set forth in his petition, Ambassador Fernandez respectfully requests that this Court grant certiorari.

Respectfully submitted,

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